

I43QBURs

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA

4 v.

15 CR 95 (AJN)
Sentence

5 NICO BURRELL

6 Defendant

-----x

7 New York, N.Y.
8 April 3, 2018
3:00 p.m.

9 Before:

10 HON. ALISON J. NATHAN

11 District Judge

12 APPEARANCES

13 GEOFFREY S. BERMAN

14 Interim United States Attorney for the
Southern District of New York

15 HAGAN C. SCOTTEN

RACHEL MAIMIN

16 Assistant United States Attorney

17 JUDITH VARGAS

Attorney for Defendant

18 -and-

19 GEORGE R. GOLTZER

Attorney for Defendant

-and-

20 YING STAFFORD

Attorney for Defendant

I43QBURs

(Case called)

MR. SCOTTEN: Good afternoon, your Honor. Hagan
Scotten and Rachel Maimin for the government.

MS. MAIMIN: Good afternoon.

THE COURT: Good afternoon to you both.

For the defendant.

MS. VARGAS: Good afternoon, your Honor. Judith
Vargas and Mr. George Goltzer for Mr. Nico Burrell.

THE COURT: Good afternoon to you both.

And good afternoon, Mr. Burrell.

THE DEFENDANT: Good afternoon.

THE COURT: We are here today for sentencing in United
States v. Nico Burrell, 15 CR 95.

In preparation for today's proceeding, I have reviewed
the probation report which is dated -- I'm using the amendment
date -- December 29, 2017.

In addition, I have received and reviewed the
following submissions: I have the defendant's primary
submission, which is dated March 27, 2018, and it has the
following attachment exhibits: Exhibit A is an extensive
mitigation report by Kathleen O'Boyle, and that document has
exhibits as well, which I have reviewed. Included in that are
a number of historical documents pertaining to Mr. Burrell, as
well as an extensive number of letters from family members and
loved ones. That all constitutes Exhibit A to the defendant's

I43QBURs

1 submission.

2 Exhibit B is the objections and comments to the
3 presentence report.

4 Exhibit C includes a number of certificates of
5 achievement and participation.

6 Exhibit D is a DVD which includes video statements of
7 family members and colleagues.

8 Then, additionally, from the defense I have a letter
9 dated March 28, 2018 which withdrew some of the remarks,
10 comments, assertions made in the sentencing submission. And
11 then I have a March 30 supplemental submission which includes a
12 letter from Focus Forward, as well as a list of books that
13 Mr. Burrell read.

14 I should note among the exhibits, the letter exhibits
15 to the O'Boyle report was a letter from Mr. Burrell that I
16 read. And that's what I have from the defense.

17 From the government, I have its primary submission
18 which is dated March 30, 2018. It too has exhibits. Exhibit A
19 was a video provided.

20 And Exhibit B which is attached is a transcript from
21 the Moye proceeding, which involves the incident of a witness
22 assault that is discussed and relevant to the sentencing here.

23 Counsel, is there anything else I should have in front
24 of me for purposes of sentencing?

25 MR. SCOTTEN: Not from the government, your Honor.

I43QBURs

1 MS. VARGAS: Nor for the defense, your Honor.

2 THE COURT: Can you confirm, please, that you've
3 received each other's submissions?

4 MR. SCOTTEN: The government has, your Honor.

5 MS. VARGAS: Yes, your Honor, from the defense.

6 THE COURT: Thank you.

7 We will turn first to the presentence report,

8 Ms. Vargas. I ask this only as a matter of record.

9 Have you reviewed the presentence report?

10 MS. VARGAS: Yes, I have, your Honor.

11 THE COURT: And you've discussed it with your client?

12 MS. VARGAS: Extensively.

13 THE COURT: Mr. Burrell, you've had a chance to review
14 the presentence report?

15 THE DEFENDANT: Yes, I have.

16 THE COURT: And raise any issues or concerns with your
17 counsel?

18 THE DEFENDANT: Yes, I have.

19 THE COURT: For the record, Mr. Scotten, you've
20 reviewed the presentence report?

21 MR. SCOTTEN: Yes, your Honor.

22 THE COURT: We are going to put aside for a moment the
23 calculation of the Sentencing Guidelines. Ms. Vargas, I want
24 to ask what continuing objections you have to the presentence
25 report regarding factual accuracy.

I43QBURs

1 MS. VARGAS: We have none at this time, your Honor.

2 THE COURT: OK. I do just want to confirm, because
3 obviously there were some that were withdrawn and some that are
4 discussed in the government's sentencing submission, to make
5 sure that I have a full understanding of your position with
6 respect to them.

7 So one of the issues that's discussed is the question
8 of Mr. Burrell's leadership in BMB. The plea agreement
9 indicated as part of its calculation a leadership enhancement.
10 I had understood your argument in the sentencing submission to
11 be, yes, he has admitted to a leadership, but we still think
12 you should put what's included in the PSR in perspective in
13 understanding that role. Is that a fair reading?

14 MR. GOLTZER: Your Honor, George Goltzer for
15 Mr. Burrell. We entered into a series of stipulations after
16 the conclusion of extensive negotiations with the government in
17 terms of what would be an appropriate disposition by a
18 government-defense plea agreement. We are not asking to back
19 off our position on leadership or the assault situation.

20 THE COURT: OK.

21 MR. GOLTZER: However, we have a difference of degree.
22 There's leadership and then there is extensive leadership and
23 mild leadership. We are going to discuss it in our remarks.

24 As the stipulations are concerned, we abide by those.

25 THE COURT: To the extent there are facts contained in

I43QBURs

1 the PSR that go to -- the factual record from which you'll make
2 those arguments, you don't contest those facts.

3 MR. GOLTZER: It's a little more nuanced than that,
4 but basically no. I'll be addressing that, and Ms. Vargas will
5 be addressing it, if you permit us, and I think it will become
6 clear there is no need for a Fatico.

7 THE COURT: That's the primary question. I want to
8 make sure before I adopt the factual recitation set forth in
9 the PSR that there is no request for a Fatico hearing with
10 respect to those facts.

11 MR. GOLTZER: We intend to mitigate things somewhat,
12 but we're not asking for a Fatico. There is no objection to
13 your accepting the recommendations factually in the presentence
14 report.

15 THE COURT: And you've discussed these issues with
16 Mr. Burrell?

17 MR. GOLTZER: Ms. Vargas has done the very heavy
18 lifting. I was learned counsel. We didn't want to duplicate,
19 but she has spent an inordinate amount of time with
20 Mr. Burrell, and I discussed it with him yesterday.

21 THE COURT: Just to complete the record then,
22 Ms. Vargas, you've discussed with Mr. Burrell that he would be
23 entitled to a factual hearing, a Fatico hearing, as it's
24 called, with respect to any material facts that would affect my
25 sentencing in such a hearing, it would be the government's

I43QBURs

1 burden to prove those facts by a preponderance of the evidence.

2 MS. VARGAS: I have, your Honor. We have discussed
3 it.

4 THE COURT: Mr. Burrell, you're not seeking any sort
5 of Fatico hearing?

6 THE DEFENDANT: No, ma'am.

7 THE COURT: Thank you.

8 I adopt the factual recitations set forth in the PSR.
9 Hearing no objections, the report will be made a part of the
10 record in this matter and placed under seal. If an appeal is
11 taken, counsel on appeal may have access to the sealed report
12 without further application to this, court.

13 Turning to the guideline calculation. As counsel is
14 aware, I am no longer required to follow the United States
15 Sentencing Guidelines, but I am still required to consider the
16 applicable guidelines in imposing sentence. I must, therefore,
17 accurately calculate the sentencing guideline range. Here, we
18 do have a discrepancy between the parties' stipulated guideline
19 calculation and the calculation contained in the PSR, and I do
20 want to ask the parties about their view as to the -- I want to
21 make sure I understand the calculation contained in the PSR so
22 that I could make my own evaluation as to the appropriateness
23 of what's included and to the extent I have questions, I would
24 value counsels' honest responses to my question and wouldn't
25 consider any such response a breach of the plea agreement.

I43QBURs

1 And as I understand it, the discrepancy here is that
2 the parties stipulated to an inclusion of an upward departure
3 with a caveat that there was a typo in the plea agreement,
4 based on what I gather was meant to be 5K2.0(a)(2)(A) on the
5 theory that the assault of the witness for a separate federal
6 offense is not otherwise accounted for in the guideline
7 calculation. Is that correct?

8 MR. SCOTTEN: That is correct, your Honor. I can
9 elaborate, but I think you have it right there.

10 THE COURT: And probation disagrees with the inclusion
11 of that upward departure on the basis that -- I'm just reading
12 from page 35 of the PSR. "Although the parties included the
13 MCC assault in their guideline calculations, we did not, as the
14 assault took place outside of the operative dates of the
15 instant offense." And probation has included that it is a
16 factor that should be considered pursuant to 3553(a) instead.

17 So what is the basis -- I mean, it is true that it
18 occurred outside the scope of the offense, obviously, given
19 that it's during pretrial incarceration for the offense. Is it
20 factually related in any way in this case to this charge?

21 MR. SCOTTEN: It is not factually related, your Honor,
22 in the sense that this assault was not motivated, so far as we
23 know, and we have a sense of what motivated it by any attempt
24 to prevent witnesses from testifying against Mr. Burrell or any
25 other member of this enterprise.

I43QBURs

1 We do think it is related in the sense that, as the
2 Court has become very familiar, BMB has this creed of
3 anti-snitching and it is very much part of being a member of
4 the gang and broader ethos, and this assault was an effort at
5 intimidation by a proponent of that creed who developed it
6 while leading the gang.

7 At the same time, I should note I'm not sure the Court
8 needs to resolve the legal disagreement, to the extent there is
9 one, between the PSR and the parties, because the whole idea of
10 the relevant guidelines provision essentially is that the
11 parties are stipulating to something that would not perhaps
12 otherwise be included. It gives the Court the authority to say
13 perhaps I would not normally add these three levels, but the
14 parties have agreed here it's relevant. We certainly think
15 it's relevant to the assessment of the defendant's culpability,
16 and the parties agreed it should be included in the analysis.
17 So I think the Court is free to accept that stipulation, not
18 because the Court would come to it independently but because
19 there's a guideline provision that allows the parties to put
20 such stipulations before the Court.

21 THE COURT: So, I mean, just so I understand it, under
22 that theory, you could put any unrelated -- I mean, anything
23 you deem related, even if sort of subjectively one would deem
24 it unrelated, before the Court, and I should include it in my
25 calculation without any independent assessment of relatedness

I43QBURs

1 in any way?

2 MR. SCOTTEN: I don't think so, your Honor. I think
3 the Court, as you've already made clear, has to come to it's
4 own calculation, and you can assess the reasonableness of the
5 parties' stipulation. If we entered a stipulation that
6 someone's guidelines should be enhanced for two levels because
7 they're a fan of the wrong sports team, the Court would look at
8 that say, "That's absurd. I'm not going to do it."

9 Here, I guess what I'm suggesting is the parties
10 stipulation is reasonable. It is not wholly unrelated to the
11 conduct at issue here. Mr. Burrell by his plea accepted it as
12 one of the predicates. It's not something that's unrelated in
13 the sense totally divorced.

14 THE COURT: You say accepted it as one of the
15 predicates. As part of the stipulated guideline range, not as
16 part of the allocution to the offense.

17 MR. SCOTTEN: That is correct. And perhaps I should
18 back off from that because the mere fact that it is used to
19 calculate his guidelines does not necessarily make it a
20 predicate. It merely requires that it be relevant conduct.

21 THE COURT: I guess just at base, what you understand
22 the stipulation to mean is that the parties agreed that it is
23 connected conduct that is not otherwise accounted for in the
24 guideline calculation and therefore appropriately assessed as
25 an enhancement.

I43QBURs

1 I tried to find some authority on the question, and
2 the closest I found was a circuit summary order in a case
3 called *United States v. Robinson*, 428 Fed. Appx. 103. It's, as
4 I said, a summary order, and somewhat comparable circumstances,
5 but it does talk about -- it says: The district court did not
6 abuse its discretion in imposing the departure based on violent
7 conduct which was aided by a fellow gang member and intended to
8 intimidate an inmate witness who reported a prior assault by
9 the defendant.

10 So, I think I just read that as saying there's got to
11 be some nexus, some connection between the conduct to be
12 considered in the upward departure, and I wanted to make sure I
13 have a sufficient factual record for that inclusion. I think
14 what you're saying is I have the stipulation of the parties.

15 MR. SCOTTEN: I do also think you have a factual
16 record. If you hadn't had it, we gave you an exhibit of the
17 transcripts. You know factually what happened there. I think
18 the question isn't lack of factual basis in the sense of the
19 Court knowing what happened. I do think the Court has to make
20 some conclusion that there is a reasonable relation here. I
21 think I've offered that to the Court.

22 THE COURT: So what would you say is the test? You
23 just said reasonable relation. Is that what you would say is
24 the test?

25 MR. SCOTTEN: So, like your Honor, we tried to find

I43QBURs

1 some authority on this that would give us an actual test, and I
2 don't want to put specific words on it because I didn't find
3 any authority that gave me those specific words.

4 I think the question is the parties have essentially
5 agreed this is relevant conduct, and it is not adequately
6 reflected in the guidelines. I think the Court's question
7 really goes to relevant conduct. I think that it's not
8 reflected in the guidelines is clear from the calculation. I
9 think this does meet the test of relevant conduct because it
10 comes out of the defendant's membership in the gang. I think
11 his actions here are motivated by this tenet of the BMB
12 membership, or at least explained in part by this tenet of the
13 BMB membership, this anti-snitching policy. I think if the
14 Court accepts it's relevant parties or at least the parties'
15 stipulation that it's relevant conduct is reasonable, it has no
16 reason to reject the stipulation.

17 THE COURT: Who will I hear from on this?

18 MR. GOLTZER: I will address it, your Honor, and I may
19 address it in a way that may not be satisfactory to the Court
20 because I find myself in a rather awkward and uncomfortable
21 position, and it's this:

22 From the beginning, this was a very difficult case for
23 Mr. Burrell on a lot of levels. He was placed, we think,
24 inappropriately at the apex of what the government
25 characterized as the largest gang take-down in the history of

I43QBURs

1 the Republic.

2 We entered into very extensive negotiations with the
3 government in good faith, and we think that they engaged in the
4 same kinds of negotiations with us. They were not easy
5 negotiations. There were contested matters of fact between the
6 government and the defense, and we both tried to accommodate
7 each other to reach what we felt would put the Court in a
8 position to fashion an appropriate guideline sentence,
9 variances aside for the moment.

10 We both have to be bound by whatever decision the
11 Court makes on how it wishes to factor in this particular
12 guideline. I want to be very candid with the Court and state
13 that it may be somewhat academic because the guidelines are no
14 longer mandatory. We are going to accept, obviously, whatever
15 decision the Court makes with respect to this guideline. If
16 the Court rules against us, we have stipulated out of appealing
17 that issue, and we would not appeal that issue. So I want to
18 put that on the table because I don't want to be in the
19 position of breaching the plea agreement, even though the Court
20 says a candid answer won't do that.

21 There was a fight. In fact, there were two fights. I
22 don't think the government is going to contest that. There was
23 a correction officer who observed Mr. Burrell fighting with the
24 prospective witness in the other case. It is clear from that
25 person's testimony that Mr. Burrell during the fight complied

I43QBURs

1 with the order way back in January of 2017 to stop fighting and
2 walk away, and he was the only person that did that. In fact,
3 that was the second fight. There was an earlier fight between
4 the prospective the witness and I believe the other gentlemen,
5 that Mr. Burrell was not involved in.

6 To the extent that we have stipulated that the fight
7 may have been in part caused by that person snitching, we're
8 accepting that stipulation. We're not going to argue with
9 that. To the extent that the government says that there was a
10 preexisting conspiracy, we're not there.

11 To the extent that the organization or the gang or the
12 enterprise, as do all of these enterprises in the streets of
13 New York, have a view about so-called snitching, to the extent
14 that the Court wants to accept that as somehow being relevant,
15 we won't appeal that either. And I think that when the icing
16 is scraped from the cake with respect to this very complex
17 young man, there is a lot more to talk about than what caused
18 this fight.

19 THE COURT: You're right, that was not satisfying.

20 MR. GOLTZER: My apologies. It's the best I can do.

21 THE COURT: It's also not wrong and -- I mean, at
22 base, I think it is academic because the stipulated-to facts of
23 this incident will be a part of my sentencing conclusion
24 whether it's accounted for here in the guideline calculation or
25 as a 3553(a) factor. I'm confident that whichever way I do

I43QBURs

1 that, the ultimate sentence will come out to be the same, and I
2 am required to accurately calculate the Sentencing Guidelines.

3 MR. GOLTZER: I appreciate that, but the Court knows
4 I'm walking a tight rope here.

5 THE COURT: I do. And I sought your input with the
6 assurance that your responses to my questions wouldn't be a
7 breach of the plea agreement, and you've given me that.

8 So am I right that other than that issue, the
9 calculation contained in the PSR is in accord with the parties'
10 stipulated calculation?

11 MR. SCOTTEN: I think so, your Honor.

12 THE COURT: That was lacking a certain level of
13 confidence.

14 MR. SCOTTEN: Yes, your Honor. It reads exactly the
15 same.

16 THE COURT: Mr. Goltzer.

17 MR. GOLTZER: Yes.

18 THE COURT: And I presume then there are no objections
19 to the calculation. Bracketing that issue, there are no
20 objections to the calculation. Is that correct?

21 MR. GOLTZER: Yes.

22 MR. SCOTTEN: Yes.

23 THE COURT: All right. I do think that in light of
24 the factual record established here, as well as the parties'
25 stipulation to the applicability of the upward departure

I43QBURs

1 pursuant to 5K -- and we'll get this right without the typo.
2 Let me just make one final point of clarification. The
3 government has represented that the plea agreement contained
4 the typo and the (a) was wrongly reflected I think as (d).

5 Mr. Goltzer and Ms. Vargas, you agree that what the
6 parties intended to stipulate pursuant to with respect to this
7 provision was 5K2.0(a)(2)(A)?

8 MS. VARGAS: Yes, your Honor.

9 THE COURT: Just to finish the earlier sentence: In
10 light of the facts contained in the presentence report, which I
11 have adopted, in light of the parties' stipulation to this fact
12 and my best reading of the available case law, I do believe it
13 is appropriate to include this upward departure based on the
14 aggravated assault on a witness in another federal case in
15 light of the contention that this is sufficiently relevant
16 conduct not adequately taken into account otherwise in the
17 guideline calculation.

18 I, therefore, am going to, based on the parties'
19 agreement, the absence of objection and my independent
20 evaluation of the sentencing guidelines, I do accept the
21 calculation contained in the parties' plea agreement. And for
22 the reasons outlined in that plea agreement, I adopt that
23 calculation process that's outlined in the parties' August 14,
24 2017 agreement. Accordingly, using the November 1, 2016
25 edition of the Sentencing Guidelines, the offense level here is

I43QBURs

1 31, the Criminal History Category is III, and that produces a
2 guideline range of 135 to 168 months.

3 I should note also that the parties agree that
4 whatever sentence I impose pursuant to 5K2.23, the parties urge
5 that I subtract the full amount of time that Mr. Burrell served
6 for the 2009 conviction from the ultimate sentence here. Is
7 that correct?

8 MR. GOLTZER: Yes.

9 MR. SCOTTEN: Yes, your Honor.

10 MS. VARGAS: Yes, your Honor.

11 THE COURT: And that is 66 months and some number of
12 days. Is that right?

13 MR. SCOTTEN: Yes, your Honor.

14 MR. GOLTZER: Yes.

15 THE COURT: So other than the upward departure I found
16 and the downward departure pursuant to 5K2.23 that I will
17 include and calculate, I do not see any other basis for an
18 upward or downward departure.

19 Is any further departure urged by the parties?

20 MR. SCOTTEN: No, your Honor.

21 MS. VARGAS: No, your Honor.

22 THE COURT: As I've said, I've otherwise considered
23 whether there's any additional basis for a formal departure
24 from the advisory range within the guideline system and didn't
25 find grounds warranting a departure under the guidelines. The

I43QBURs

1 parties' plea agreement leaves them free to argue for a
2 variance, and I think both sides do argue for a variance -- the
3 defense for a downward variance and the government for an
4 upward variance.

5 And with that, I will hear from you, Mr. Hagan.

6 Mr. Hagan, I'll hear from the government.

7 MR. SCOTTEN: OK.

8 So, your Honor, I'll be fairly brief.

9 THE COURT: I'm sorry, Mr. Scotten, I do that.

10 MR. SCOTTEN: Because my parents gave me a last name
11 for the first name. Happens all the time, your Honor.

12 THE COURT: Yes.

13 MR. SCOTTEN: So I will be fairly brief.

14 You have our submission, and since our submission
15 comes last, I don't think there's a lot of unaddressed points
16 from the defense out there.

17 So I just want to stress a couple things. The first
18 is that the government believes a sentence of 14 and a half
19 years is appropriate here. We said that in our submission, but
20 there are a couple points about that I want to stress. I think
21 the Court is aware requesting an above-guideline sentence is
22 not a step we take likely. It requires approvals a couple
23 levels above the people sitting here. I think throughout this
24 case we have been very reasonable in our sentencing requests,
25 often pointing out when one defendant is like another, knowing

I43QBURs

1 full well that will result in a below-guideline sentence
2 because the Court has already applied a below-guideline
3 sentence to the prior defendant, and generally taking the view
4 that the Court's practice of sentencing, especially non-violent
5 drug offenders to below-guideline sentences, that we've sort of
6 accepted that and not disagreed with it as a systemic matter.
7 I've talked to Ms. Maimin, we're not a hundred percent certain
8 on this, but we believe it's the only time in this case we've
9 asked for a variance.

10 THE COURT: I have upwardly varied once but not at the
11 government's request.

12 MR. SCOTTEN: That is my recollection as well, your
13 Honor.

14 I want to stress for reasons I'll get to in a minute
15 and we've explored fully in our submission, we believe a 14 and
16 a half year sentence is appropriate. I know sometimes some
17 judges may feel "If we shoot here, hoping the Court will come a
18 little bit below that." That is not the case here. We're not
19 asking for 14 and a half years hoping the Court will decide 12
20 is appropriate. I understand the Court will make its own
21 judgment.

22 Our view is the gravity of this defendant's offenses
23 relative to the statutory count to which he has pled guilty are
24 as severe as the Court might expect to see. There are, of
25 course, worse crimes in the racketeering conspiracy, and the

I43QBURs

1 Court will sentence at least several defendants who have
2 committed murders or more serious crimes than that; but within
3 the realm of racketeering conspiracy, I think the harms the
4 defendant has inflicted are remarkably severe.

5 The Court knows that the defendant shot two people;
6 one of them innocent. And then went back to the gang life
7 after shooting an innocent woman in the arm and failing to kill
8 a young man, really, a boy, he chose to return to this gang and
9 to lead it. I'm not going to go into more detail of the
10 destructiveness of prescription opiates he sold, and I do think
11 they fully warrant the guidelines, and that we are sort of
12 going from there based on all the other crimes, but I do think
13 the Court should hold the defendant accountable under Section
14 3553(a) for his leadership role in propagating violence, for
15 coming back from prison saying, "I shot two people. Do what I
16 do did;" for continuing to not only sell drugs but urging
17 others to do so in his videos; and really for this wave of
18 violence that overtook the community -- murders, shootings,
19 stabbings, assaults. The Court has seen the consequences of
20 this, and often I think that confronted with lower-level
21 defendants who, to some extent, may have felt to the Court and
22 certainly to themselves like they were caught up in something.

23 This is the defendant who founded that gang. If you
24 want to see why that happened, it is sitting in the courtroom
25 here today. It is this man who helped bring all that misery

I43QBURs

1 into the community. And I'm not going to talk a lot more about
2 all the crimes this Court has sentenced for, crimes which in
3 some cases the Court might have felt the defendant sitting in
4 that chair was to a degree a victim himself. To the degree
5 those defendants were victims, they were caught up in
6 something, this is the perpetrator of the crime against them as
7 well.

8 What I think I want to stress before I sit down, maybe
9 hit one more point, is another line from the defendant's
10 videos, and one that is not in the PSR. We didn't stress it in
11 our submission because on its face, it's not even that
12 criminal. In one of the defendant's videos, he has a refrain
13 where he talks about how he walks by other men, they don't
14 talk; they just mumble. When he walks by regular people,
15 people who aren't important members of the BMB like him, people
16 who aren't feared gangsters, they can't hold their heads high.
17 They can't meet him eye to eye. They can't talk to him.
18 They're not his equal. They have to look down. That is the
19 huge amount of damage this defendant did.

20 To stay in that community, if you want to be a big man
21 if you want to be a proud person, if you want to hold your head
22 high, you've got to be a part of this gang. If you're somebody
23 who goes to work, who goes to school, who doesn't start fights,
24 who doesn't sell drugs, you look down and you mumble. We're in
25 charge of this neighborhood. Not you. That kind of

I43QBURs

1 destructive behavior that can infect an entire community is a
2 big part of what this Court should be punishing today.

3 And I suppose the last thing I would say -- I don't
4 want to repeat it because I think we said it a lot in our
5 sentencing submission, but, your Honor, as you hear this
6 defendant speak today, as you hear his attorneys try to make
7 the case that he's been rehabilitated in prison, I urge the
8 Court to consider the fact that it's all been said before when
9 he got a reasonable five-year sentence for an attempted murder
10 and yet he came back out of it and started doing the same
11 things again, when he came back out of that sentence and
12 started selling drugs, carrying guns, making these videos and
13 encouraging other people to repeat what he did, leading a gang
14 that was in an ongoing war that resulted in multiple deaths.

15 I'm not going to tell the Court not to consider what
16 these attorneys and this defendant say. Of course, it will.
17 But I do think the Court should constantly take it with a grain
18 of salt, knowing those things have been said before and knowing
19 all the havoc that ensued when the Court to some degree gave
20 credence to them.

21 Subject to the Court's questions, I have nothing
22 further.

23 THE COURT: Thank you.

24 Ms. Vargas.

25 MS. VARGAS: Your Honor, I'm going to address the

I43QBURs

1 Court, but Mr. Goltzer would also like to address the Court.

2 THE COURT: I'm fine to hear from you both.

3 MS. VARGAS: Thank you, your Honor.

4 Your Honor, the first thing that I'd like to say in
5 response to the government's statement just now is, in sum and
6 substance, the government would like to implicate Mr. Burrell
7 for every single act of violence that occurred in this case,
8 except the one fact that they don't discuss is that Mr. Burrell
9 was incarcerated from 2009, which was the supposed inception of
10 this conspiracy up until 2014, for nearly six years, which is
11 most of the duration of this conspiracy. And what's
12 interesting, or what's curious, is that what they rely on to
13 implicate all of this misery and all of this suffering that
14 Nico Burrell allegedly caused this neighborhood are video
15 statements. Video statements, your Honor.

16 We stated in our submission, we discussed this
17 extensively, these were simply statements of expressions of
18 art, expressions of speech, bombastic theater, if you will, and
19 nothing more. And there's no evidence to prove otherwise.
20 There's no evidence to prove that because of these videos,
21 therefore, 62 other defendants in this case went out and
22 committed the violence that they committed. I say that's a
23 stretch.

24 THE COURT: I do understand that point. And to the
25 extent that I have considered comparable evidence in other

I43QBURs

1 sentencings, I have essentially taken it for the proposition
2 that it is an extolling of gang violence, a sort of glorifying
3 and extolling of others to engage in gang violence and other
4 illegal activity. I think it appropriate to consider it
5 comparably here and not as proof itself that somehow
6 Mr. Burrell, apart from what flows from his stipulation to a
7 leadership role, is responsible for everything that occurred,
8 right?

9 So, there's two facts. There's a fact he stipulated
10 to a leadership role, and I've sentenced other leaders of the
11 gang, particularly when there are acts of violence, to very
12 substantial sentences because as some level the gang violence
13 does flow from the leadership. So there's that fact. And the
14 government has often, I think, tried to do a lot with it, but
15 from my perspective, it's a sense of -- it's at least a
16 glorification of the violence and extolling the violence as
17 sort of encouragement to others to engage in gang activity.

18 MS. VARGAS: Your Honor, no more than any other
19 artists that are out there today that are engaging in the same
20 type of videographic content, considered superstars in today's
21 day and age, and utilizing the same type of hip-hop, rap music
22 video content. Jay-Z is a perfect example of this. Snoop Dog.

23 THE COURT: But Jay-Z's -- they're not a leader of
24 violent gangs.

25 MS. VARGAS: Who knows, Judge? What I'm saying is the

I43QBURs

1 video in and of itself doesn't speak to much. Is Nico Burrell
2 perhaps guilty of enjoying an inflated reputation by other
3 children in his neighborhood who learned about how he did a
4 five and a half year stint in jail for an attempted murder?
5 Yes, more than likely. But guilty of extolling violence
6 because of something that he rapped on a video? Did he mimic
7 other artists that were also engaged in the same type of
8 artistry? Absolutely. Many artists in today's day and age.
9 But extolling violence I think that is a lot to say for him,
10 and I think it's misput. I think it is not an accurate
11 assessment.

12 Mr. Burrell was incarcerated for five and a half years
13 for the attempted murder shooting, which is a part of our
14 stipulation -- which is relevant conduct, actually. We
15 stipulated to that as relevant conduct.

16 THE COURT: Right.

17 MS. VARGAS: When he leaves the prison -- and this is
18 the part that the government wishes the Court to consider as
19 his most heinous period in his history of this conspiracy.
20 When he leaves the prison, he now comes home and starts doing
21 these music videos. Yes, we are not disputing that in any way.
22 We have the videos.

23 Do we like the music? We don't have to. Maybe some
24 of us don't. But we don't have to like it. What we have to
25 see it for is what it's worth. It's simply videos, which many

I43QBURs

1 other Black artists, particularly Black artists who have come
2 out of inner city neighborhoods like the one that Nico Burrell
3 came from, many of them engage in this type of videographic
4 content.

5 So I think that it's interesting that the government
6 really hangs its hat on this because there is nothing else that
7 they can hang their hat on. There is nothing else that they
8 can say that Nico Burrell was doing in the two years that he
9 was out.

10 THE COURT: Well, again, just to be clear, he
11 stipulated to a leadership role.

12 MS. VARGAS: Yes, your Honor. We're not pushing back
13 from the stipulations, as Mr. Goltzer just told the Court a few
14 moments ago, but we have to put everything in perspective.

15 And the government would like -- the Court has to take
16 the mandate and consider under the law the 3553 factors, but
17 there is not just one factor to consider, and the Court would
18 like it to simply be the nature and circumstances of the
19 offense. There's more under 3553. And under 3553(a) it's
20 nature and circumstances of the offense and history and
21 circumstances of the defendant. That has to be considered as
22 well in tandem with all the other factors. And we submit that
23 if the Court takes everything into consideration, it cannot do
24 as the government is asking.

25 First of all, with respect to what they are asking,

I43QBURs

1 the government is asking for a variance. In a sentencing memo
2 it is actually seeking an upward variance basing its request
3 upon all of the conduct that we stipulated to as enhancements
4 and upward departures, such as the four-point leadership role,
5 which we are stipulating to and which we stand by, the
6 two-point weapons enhancement, which we stipulated to and we
7 stand by, and an upward departure to level 34 for the fight at
8 MCC.

9 So the defense does take issue with the government's
10 claim that it seeks a variance based on those factors because
11 we believe that what the government is doing is indirectly
12 seeking a forbidden guideline departure under the guise of a
13 variance by using the stipulations that defense counsel entered
14 into to raise the guidelines levels to essentially double count
15 the stipulations. We believe that this is a violation of the
16 spirit and letter of the plea agreement. And by way of
17 example, the government should not be allowed to use the
18 leadership enhancement twice, which is what it seems that it is
19 doing in this case -- once to gain a higher guideline range and
20 the second time to achieve a variance, and this has been
21 repeatedly done in the government's sentencing memo. Yes, we
22 both agreed that either party could ask for a variance. Yes.
23 That's on page 5 of the plea agreement.

24 THE COURT: I guess I do need to understand if you're
25 contending that the government has breached the plea agreement,

I43QBURs

1 and then if you are, we need to consider the possible --

2 MS. VARGAS: What we're saying, your Honor, is that
3 what they are asking for violates the spirit of the plea
4 agreement in that they are going above and beyond a variance.
5 They are asking for a sentence starting at the max at 20 years
6 and then asking for that sentence to be reduced by the 66-month
7 departure. But the basis for that variance they're cloaking
8 under the 3553 factors, although we stipulated to those
9 enhancements that they are now calling 3553 factors.

10 THE COURT: I think we need to deal with whether you
11 are making a formal assertion that the government has breached
12 the plea agreement.

13 MR. GOLTZER: We are not stating that they have
14 breached the agreement, your Honor. We are simply pointing out
15 what the government is doing in its sentencing memorandum.

16 THE COURT: I guess I just want to make sure. So, for
17 example, you do here, and in almost every sentencing proceeding
18 I have, defense will argue for me to take into account the
19 3553(a) factors, the defendant's genuine acceptance of
20 responsibility and remorse, right? I presume you do want me to
21 take that into account in the 3553 factors, correct?

22 MS. VARGAS: Yes.

23 THE COURT: That's not a spirit breach of the plea
24 agreement, is it, even though it's part of the stipulated to
25 guideline calculation for a reduction of the calculation as a

I43QBURs

1 result of that stipulation. Even though it's a sort of double
2 counting of acceptance, I've never been asked to deem that a
3 breach of the spirit of the plea agreement by the government
4 even though almost every sentencing I encounter, the defense
5 wants me both to formally calculate that into the guideline and
6 take into account in varying below the guideline range.

7 MS. VARGAS: Except that in this case what the
8 government is asking the Court to do is exclusively in their
9 sentencing submission, they discuss his leadership, so,
10 therefore, the Court should sentence him at the highest
11 possible sentence because of his leadership role. We
12 stipulated to the four-point leadership enhancement. Then they
13 say because of the weapons in the case. We stipulated to the
14 two-point weapons enhancement in this case. Then they talk
15 extensively about the assault at MCC. Not only did we
16 stipulate to an enhancement, it was up to a level 34
17 enhancement.

18 So it's not just that I'm saying, your Honor, please
19 take into consideration his remorse. It's almost as if I were
20 saying, your Honor, I would like you to please take into
21 consideration the 5K2.23 downward departure, 66 months. But
22 also I'm asking for another 66 months as a variance because of
23 and I use the exact same reasons. That's not what we're doing
24 here. We gave the Court an extensive sentencing memorandum
25 outlining specific reasons as to why Mr. Burrell merits a much

I43QBURs

1 lesser sentence. And when we entered into this plea agreement,
2 we understood that the 66-level reduction -- not that it was
3 going to come from a sentence of 20 years. That's outrageous.
4 We understood that the 66-level reduction was going to come
5 from the stipulated guidelines range. In fact, that's what it
6 says in the plea agreement. It is understood that the defense
7 will ask for a downward departure from the stipulated
8 guidelines range. And now it seems that because we filed a
9 sentencing memorandum asking for a variance that now the
10 government is asking for an even higher variance because of
11 that, which we were absolutely permitted to do.

12 THE COURT: Yeah, I mean you're both permitted to do
13 it by the tone of the agreement.

14 MS. VARGAS: We would like the Court to consider
15 everything. We feel that in stipulating to the plea agreement,
16 we have agreed to conduct; Mr. Burrell had never denied the
17 conduct. He stipulated to the leadership role. He stipulated
18 to the weapons. He was, in fact, convicted of an attempted
19 murder in 2009, and he stipulated to the conduct that we just
20 discussed extensively.

21 But there is more to Mr. Burrell than what the
22 government would have the Court consider. Much more. He is
23 not simply this guy who came out of jail, and he's rapping
24 about videos and encouraging 63 other defendants to shoot
25 people and commit the other crimes discussed.

I43QBURs

1 We hired an independent expert, a professional former
2 United States Probation and Pretrial Services officer who is
3 now an expert in this field to conduct an in-depth
4 investigation into Nico Burrell's entire history. And she
5 wrote a comprehensive report, 14 pages practically
6 single-spaced, where she concludes that based upon all of the
7 factors in this case, the case included -- that based upon all
8 of those factors, including the offense, as I just said, as
9 well as his difficult childhood and his incarceration which now
10 spans 90 months, that Mr. Burrell has grown, is well on the
11 path to rehabilitation and absolutely should be given the
12 opportunity to continue on this path of learning and growth.

13 She states, and I quote, "Mr. Burrell has spent a
14 total of 90 months -- 66 months in New York State Department of
15 Corrections Prisons and 24 months in MCC detention -- behind
16 bars, the past two years in harsh conditions of high security
17 detention at the MCC. Based on his limited involvement in the
18 conspiracy following his release from prison in 2014, his
19 impressive rehabilitation efforts and what may be a
20 once-in-a-lifetime chance of turning his passion for music into
21 a lucrative career, further incarceration may not only be
22 unnecessary to accomplish sentencing goals but may actually
23 impede Mr. Burrell's continued rehabilitation and diminish his
24 future prospects for leading a successful, law-abiding
25 life."This is coming not from his defense advocates. This is

I43QBURs

1 coming from a reputable expert, a professional, a former United
2 States Pretrial Services and Probation officer.

3 Yet, the government does not seem to acknowledge any
4 of this. It will not acknowledge any of the difficulties in
5 his life; the fact that in his preteen years, not one, but both
6 of his parents were deported to Jamaica. He has never seen his
7 mother again. And that was at the age of 13 or 14 years old.
8 The government refuses to acknowledge that his stepfather, who
9 was the only role model in his life after his father's
10 deportation, has been serving since then a 27-year jail
11 sentence. They will not acknowledge that. They will not
12 acknowledge that this young man had been most of his entire
13 life living in homeless shelters, including the weeks prior to
14 when he was arrested on this case. They will not acknowledge
15 any of the strides that he made while he was incarcerated in
16 two of the most notoriously violent prisons in this state:
17 Rikers Island, the embattled Rikers Island, where he spent two
18 years at the age of 16. He was a child. They will not
19 acknowledge that. Two more years and change at Clinton
20 Correctional Facility, a notoriously violent prison, at the age
21 of 18 when most of us at that age were looking to get into
22 colleges.

23 They won't acknowledge any of the strides that he's
24 made while incarcerated in the past 24 months. In fact, they
25 appear to mock him in the sentencing memo. Yes, he is a

I43QBURs

1 voracious reader. He has read an astounding 120 books, a fete
2 that's incomparable for many of us, and, of course, yes, he has
3 time in prison, but that's still something to acknowledge.

4 He participated in one of the most
5 difficult-to-get-into programs in federal prison today, The
6 Focus Forward Project, and he was one of the two valedictorian
7 speakers at the graduation ceremony that I was actually
8 fortunate enough to be allowed to attend because no one from
9 the outside is ever allowed to attend these proceedings. And
10 he's received certificates from other courses as well. I
11 submitted those to the Court with our sentencing submission.
12 He's mastered the game of chess. The government was mocking
13 him about that as well. He's highly intelligent. He's highly
14 motivated in every way to excel because he knows, and he
15 accepts his past conduct, and he knows that what he did was
16 wrong.

17 Now, the government says in its sentencing memorandum,
18 well, that's true, but he was this grand leader. Well, why
19 isn't it also proof that he has the capacity to rehabilitate;
20 that he has the capacity to grow. His most serious offense is
21 the prior conviction from 2009 for the attempted murder which
22 the parties stipulated is relevant conduct. He served five and
23 a half year prison sentence for that as a 16-year-old child.

24 So Nico Burrell has spent nearly the entire span of
25 this conspiracy incarcerated, a conspiracy allegedly spent from

I43QBURs

1 2009 to 2016. Correct me if I'm wrong. He was arrested in
2 2009. He spent five and a half years incarcerated. He was
3 released in 2014, and re-arrested on this case in 2016. And
4 when he was released, he threw himself into his passion, the
5 same passion that the government would ask the Court to
6 consider malevolent.

7 He's actually being sought after by record producers
8 and recording studios and record labels for this malevolent
9 music that has caused this misery according to the government.
10 If it's so malevolent, why is he being sought after? It's
11 prevalent in society this music, whether we like it or not.

12 So yes, the Court should consider the offense conduct.
13 We've stipulated to the offense conduct, your Honor. And, yes,
14 as your Honor stated, he is remorseful for his conduct. He has
15 shown that. But the Court must also consider who is Nico
16 Burrell -- a 25-years-young man who spent more than a third of
17 his life incarcerated. Yes, through his own actions, we don't
18 dispute that, but that also has to be taken into consideration.

19 He's a young man who made a mistake, but he's
20 acknowledged that mistake twice: Once in 2009 and then again
21 two years ago when he pled guilty on this offense. He's not
22 without hope, your Honor. He's well loved and staunchly
23 supported by family and friends, most of which are here today.
24 As you can see, the courtroom is filled. He is genuinely a
25 good person.

I43QBURs

1 Now, of course the Court could take this with a grain
2 of salt, but we provided the Court with a stack of letters from
3 friends and loved ones and family members who attest to his
4 good character, and they know about his prior convictions and
5 they know all about the charges here. We attached to our
6 sentencing submission a video with statements from his aunt,
7 she's here today, his sister, his grandmother, who is of ailing
8 health, she is also here today. And from his manager, Sherwin
9 Charles and from one of the producers of his videos, Alistair
10 Christopher.

11 They all attest, all of them to his incredible work
12 ethic, to his drive, to his ambition. And not only that, you
13 have grown men talking in the videos that we submitted stating
14 that he expresses his love to him. That is not the picture the
15 government portrays but that is the other side that the Court
16 should consider. He has demonstrated a fierce determination to
17 change, your Honor. And we submit that he has. And not just
18 now during his last two years of incarceration, but before his
19 incarceration when he was released from state prison.

20 The government points to all of the videos as
21 evidence, aside from what we stipulated to in the plea
22 agreement, but there is another side to him. And that's why
23 we're asking for the sentence we're asking for. It's not an
24 unreasonable sentence, especially when considered with all the
25 other sentences that the Court has handed down in this case. I

I43QBURs

1 listed a few of the sentences in my sentencing memorandum.
2 Barfffour Abeberse, number eight in the indictment, received a
3 sentence of 102 months, though he's considered to be a much
4 more violent offender in comparison to Mr. Burrell. That
5 defendant was arrested with a loaded firearm, for which he was
6 sentenced at state to probation and which he violated twice.
7 Mr. Burrell has been on parole and was never violated. That
8 defendant participated in a shooting at a public housing
9 project where he shot the victim in the calf.

10 THE COURT: He was on criminal justice supervision at
11 the time of this arrest, correct?

12 MS. VARGAS: Yes, that's correct, your Honor.

13 The other defendant participated in the beating and
14 robbery of a woman. Participated in a brawl that led to the
15 murder of a 15-year-old. And sold crack and was found inside
16 of an apartment where a .45 caliber pistol was recovered.

17 Mashud Yoda, number nine, his sentence was adjusted to
18 96 months. His conduct includes that he was a fugitive in this
19 case. He was found hiding in Ithaca after an extensive
20 government manhunt. He was also arrested where a search
21 warrant was conducted and a pistol was recovered, and that
22 pistol was tied to the murder of Keshon Porterfield in this
23 case. He received a sentence of 96 months.

24 We believe that the sentence we're requesting would be
25 fair in light of everything that we've presented to the Court,

I43QBURs

1 including the conduct for which he's charged, and in light of
2 all the other sentences that the Court has handed down, and the
3 Court has the latitude and the discretion to do this, to impose
4 a sentence that fits the crime and the person before the Court
5 and to take into account Mr. Burrell's troubled background, his
6 history and characteristics as well as his efforts at
7 rehabilitation.

8 With that, your Honor, unless the Court has any
9 further questions, I think Mr. Goltzer would like to address
10 the Court.

11 THE COURT: Thank you, Ms. Vargas.

12 MS. VARGAS: Thank you, your Honor.

13 MR. GOLTZER: Thank you, Judge.

14 I will not be as long as Ms. Vargas who has been
15 taking the lead but there are some things that I would like to
16 address.

17 One of the really guiding factors of my own career has
18 been the work of Clarence Darrow. And I was reading some of
19 the remarks that he made to a sentencing judge in the Leopold
20 Loeb case back in the early part of the Twentieth Century when
21 two gentlemen from very prominent and wealthy Chicago families
22 engaged in a thrill killing for the fun of it, and everybody
23 was clamoring for their death.

24 And what Darrow told the judge in substance was,
25 before you can mete out justice to what is essentially a very

I43QBURs

1 frail piece of human clay, you have to take a look at
2 everything that's behind that frail piece of clay, the
3 civilization, parents, the grandparents, all of the motivating
4 factors. And if you can do it, said Darrow to the judge, who
5 ultimately gave them life and not death, if you can do it,
6 Judge, you're wise. And he concluded by telling the judge what
7 I'm going to tell you. With wisdom goes mercy.

8 When I was appointed to this case, I was appointed as
9 learned capital counsel because the government had promised
10 that they were going to indict Mr. Burrell for a capital
11 offense. He, unlike others in this case, has never been
12 charged with murder. The government doesn't have a provable
13 murder. And for the government to stand here and tell you that
14 he is the worst of the worst, the worst defendant in this case
15 is astounding to me.

16 MR. SCOTTEN: To be clear, we were very careful not to
17 say that. The murderers haven't been sentenced.

18 THE COURT: You'll have a chance.

19 MR. SCOTTEN: OK, your Honor.

20 THE COURT: Go ahead, Mr. Goltzer.

21 MR. GOLTZER: What the government said in its
22 memorandum that he is the worst who is to be sentenced. If the
23 murderers haven't been sentenced, I'm unaware of that. He is
24 not the worst of the worst to be sentenced in this case.

25 Quite the contrary. The Supreme Court recognized not

I43QBURs

1 too long ago when it said you couldn't kill people who
2 committed murders when they were under 18 years of age. The
3 Supreme Court recognized the scientific studies that had been
4 done about the status of the adolescent brain, and when he shot
5 those shots in 2009 at the age of 16, his brain hadn't been
6 fully developed. He lived a Dickensian childhood with every
7 conceivable kind of deprivation, and it is no wonder that at
8 that age when he wasn't fully developed emotionally or
9 intellectually, he embraced a second family, which was the
10 street.

11 And that's not a surprise to you. It's not a surprise
12 to me, who's been on too many of these cases that that gang
13 milieu, that gang culture takes these children in with the rap
14 music and the culture I prefer Brahms, quite frankly. That
15 culture is counterproductive. I accept that. The Court
16 accepts it. But it is a fact of life. And he jumped in with
17 both feet when he was 16 years of age, and it wasn't a
18 reasonable sentence, I don't believe. There could have been
19 supervision there could have been therapy.

20 Instead, there was warehousing of a young man who came
21 out of prison in 2014 hardened, who went back out into the
22 street and assumed a leadership role to the extent that he did
23 extol them to live in the gang rap culture. He did extol them
24 not to snitch, but I don't see evidence that he shot anybody
25 after he got out of prison. I see evidence that he lived in a

I43QBURs

1 homeless shelter, and he was able to sell a few pills, some
2 number of pills because he had access to a source that the
3 conspiracy was responsible for 8,000 pills but he was living in
4 a homeless shelter and penniless supported by family and
5 friends while he was trying to engage in a career as a
6 musician.

7 And, yes, Ms. Vargas is right; they're mocking him for
8 it. They're denigrating his intelligence. They're denigrating
9 his leadership capacities. But it is that very capacity that
10 has led him to be where he is at 25. And at 25 he's a heck of
11 a lot different than he was at 16 or 18 or even 21 or than he
12 was in 2016.

13 I told you before, your Honor, that when the
14 corrections officer said "Stop fighting, walk away," he walked
15 away. He not only walked away from the fight, but he walked
16 away from that life. He's not the same person today that he
17 was in January of 2017. If you accept what the government is
18 saying about him, that everything he did to rehabilitate
19 himself to show genuine remorse was phony, you'd have to
20 believe he fooled everybody in this courtroom; that the people
21 who wrote letters and told you that Nico Burrell took care of
22 my special needs child, did good deeds in his life, tried to
23 take care of his grandmother, took a homeless man on the street
24 and gave him hope. You'd have to believe he fooled all those
25 people. You'd have to believe the people who are here from the

I43QBURs

1 Forward Focus group who wrote a beautiful letter on his
2 behalf -- and they're sitting in the third row and smiling at
3 me, your Honor -- you'd have to believe that those people who
4 deal with prisoners every day and have seen every variety of
5 con known to man were taken in by Nico Burrell.

6 And that's simply false. It is not true. And they're
7 wrong about it. They have constructed a pyramid. They put
8 Nico Burrell at the point of the pyramid, and they say he was
9 the leader of the gang. Your Honor has already sentenced other
10 so-called leaders of the gang. This isn't an enterprise with
11 one leader. This isn't the Bonanno crime family or Gambino
12 crime family.

13 This is a bunch of kids living in the hood, living a
14 certain lifestyle that's counterproductive, and he's walking
15 away from the it. That's what he's leading. He was rapping
16 the life, but he wasn't telling people to kill anybody. Do you
17 think he was sitting there in Clinton Correctional Facility or
18 in Rikers Island telling people to go kill somebody? There's
19 no evidence of that in this case, and yet they had him as the
20 lead defendant, and that is why I was appointed. And I'm happy
21 to say I didn't have to deal with a capital charge.

22 But if I had to deal with a capital charge, I have
23 classic mitigation. Parents deported. A child deprived of his
24 loved ones. A child living in poverty. A child being taken
25 care of by a 19-year-old sister? Classic mitigation. It is a

I43QBURs

1 miracle and a testament to the human spirit that he's able to
2 climb out of it and have a future.

3 In terms of 3553(a), one has to look to general
4 deterrence, specific deterrence. He's deterred. You think
5 you're ever going to see him here again? No. He's done. He
6 hasn't fooled all the people in this courtroom. And there is a
7 difference -- if I might take issue with something your Honor
8 said. There is a difference between acceptance of
9 responsibility and extraordinary or genuine remorse. I can get
10 acceptance of responsibility by saving them the trouble of a
11 trial, taking a plea, and the probation officer says give him
12 three points. But that's not genuine remorse.

13 Genuine remorse is what's in your heart, and he feels
14 genuine remorse, and you're going to hear from Mr. Burrell.
15 And he's not here to fool you, and he's not here to fool
16 himself. He's changed. He will never be back in this
17 courtroom again as a violator of the law. There's great hope
18 for this young man. He's been rehabilitated. He's accepted
19 responsibility. And more than that, he is remorseful for what
20 he did. His letter is extraordinary. We didn't write it for
21 him. And to mock his intelligence and to mock his leadership
22 ability is wrong, and the government's wrong. And I respect
23 these prosecutors.

24 THE COURT: I don't -- I'm not sure I know what you
25 mean by mocking. It wasn't how I read it. I heard them

I43QBURs

1 arguing that I should understand his intelligence and his
2 leadership abilities as they contend he's used them, but --

3 MR. GOLTZER: Perhaps mocking is the wrong word. But
4 to the extent that they denigrated it, I think it's
5 inappropriate. I've seen too many young men who are
6 intellectually disabled or who were what one would classify as
7 antisocial personality disorders who were hopeless, who had
8 limited prospects, who were dangers to the community, and they
9 were very difficult to represent. And courts were tortured by
10 what they had to do because there was a hopelessness
11 surrounding them.

12 But that's not him. I am pleased to be able to tell
13 you that you can have wonderful conversations with Mr. Burrell.
14 There's a heart to Mr. Burrell. There's a lovingness to his
15 family and friends about Mr. Burrell. That's why they're here.
16 Look at this courtroom. It's a crowded courtroom. And Kathy
17 O'Boyle wasn't fooled. Kathy O'Boyle spent how many years? I
18 don't know how many years you spent, Kathy. I've known her for
19 25 years. She's seen it all. She was a probation officer.
20 She was a pretrial officer. She's taught probation officers.
21 He didn't fool Kathy O'Boyle. You can't con her. You can con
22 me maybe, but you can't con Kathy.

23 So he's not coming back. He's been deterred. Nobody
24 from the outside who looks at Nico Burrell and what he's been
25 through in terms of his incarceration and the loss of his

I43QBURs

1 family and the separation from his grandma, who is really one
2 of the few people that he really cares so much about that he
3 can't stand the fact he's been away from her. Everybody else
4 has survived. No one who looks at that life at what he's been
5 through now, he's been 90 months in jail, Judge. He's been in
6 prison 90 months over this case.

7 THE COURT: You mean counting the 66 months.

8 MR. GOLTZER: That's right.

9 THE COURT: Here's the fundamental question,
10 Mr. Goltzer, which is that he commits the attempted murder in
11 2009. He's 16. He attempts to kill a rival gang member and
12 doesn't.

13 MR. GOLTZER: Well, he didn't attempt to kill --

14 THE COURT: Right.

15 MR. GOLTZER: It was unfortunate.

16 THE COURT: And in the course of it an innocent
17 bystander. And that's obviously a very serious crime mitigated
18 by his age.

19 MR. GOLTZER: I'm not minimizing it.

20 THE COURT: And that's part of his gang activity.

21 He gets out in 2014 and then proceeds to be a leader
22 of this gang.

23 MR. GOLTZER: Correct.

24 THE COURT: And in the course of that, there's
25 obviously the extolling of the violence, but they're selling

I43QBURs

1 drugs. The question is, is the carrying weapons referring to
2 2009 or is it activity after the 2014 release?

3 MR. GOLTZER: I believe that the government is
4 probably contending that it's later, although I've seen no
5 evidence of it, quite frankly. I do not know that there's ever
6 been the seizure of a weapon or even a bullet or a knife from
7 Mr. Burrell. There is an allusion in the incident in the
8 prison to an allegation that he had some kind of object that he
9 dropped but no one ever recovered it, and there doesn't appear
10 to be the kind of injury that would have been caused by a knife
11 or shank or a weapon. I don't see anything about weapons other
12 than discussing them in videos, but I don't see anything that
13 he ever carried a weapon after he came out of jail.

14 THE COURT: Let me just get an answer to that.

15 Is that stipulated conduct related to the 2009
16 incident?

17 MR. GOLTZER: That's my understanding.

18 MR. SCOTTEN: No, your Honor. In fact, to the
19 contrary, the defense has already agreed the gun is after that
20 time. That is paragraphs 7 and 7A of the plea agreement. You
21 see, the gun is not connected to his gang membership in
22 general. It is specifically connected to carrying that gun.

23 THE COURT: In furtherance of the oxy.

24 MR. SCOTTEN: Which he is dealing when he comes out of
25 prison, so there should not be any dispute.

I43QBURs

1 MR. GOLTZER: If I misspoke, I'll back off.

2 THE COURT: All right. So just thinking here. I
3 wanted clarity on that point. So what we've got is this very
4 serious crime happens. He's sentenced. He interacts with the
5 criminal justice system. He comes out in 2014. And what he
6 does is become a leader -- or continues to be or is a leader of
7 the BMB gang, which is a violent gang. He's selling oxy in
8 furtherance of that conspiracy. He's carrying weapons in
9 furtherance of that. He's extolling gang violence.

10 So whatever lesson you're saying he's learned now, he
11 hadn't learned between 2014 and 2016 when he's incarcerated for
12 this offense. Right? So the government says all of -- that's
13 their version of it. And my question is, because you say none
14 of these people can be fooled, but you can be, and the question
15 is: What evidence do I look at to try to make this assessment?
16 Is Mr. Burrell this changed person that you're talking about or
17 does the record before me suggest five and a half years in
18 prison didn't change him and even incarceration for this crime
19 didn't change him because he assaulted a witness in another
20 case during his pretrial incarceration? Those set of facts
21 strongly cut the other way from the picture you're describing.

22 MR. GOLTZER: Let me address it. When he came out of
23 prison in 2014, he had just spent over five years in a horrific
24 environment which is not really designed as it originally was
25 hoped it would be to rehabilitate. Anyone who thinks that

I43QBURs

1 going to Rikers Island is going to rehabilitate somebody is
2 somewhat naïve in our view. And Clinton is even more
3 aggravated. I don't know if your Honor has ever had the
4 privilege of looking at that wall in Dannemora, New York, but
5 it's chilling, to say the least.

6 So when he came out with some status in the hood, if
7 you will, and he started engaging in rap videos and tried to
8 support himself by selling some pills, that's not unusual.
9 That's not at all unusual. But he was not the apex of a
10 pyramid. I think they're overstating that terribly. He did
11 what he did. He was who he was. But that's not who he is now.
12 And the fight that took place was in January of 2017. Many,
13 many months ago. It's well over a year ago.

14 At the same time that this young man was doing what he
15 wasn't supposed to do, the evidence seems clear that he was
16 also helping people. You have that in the letters, Judge. He
17 was doing decent things at the same time. He's a complex young
18 man. Notwithstanding the deprivations that he suffered, he
19 found it in his heart to help people and give them hope. And I
20 don't think even the government would contradict that. No one
21 is suggesting in this courtroom that the people who wrote those
22 letters made it up.

23 The fact of the matter is that since January of 2017,
24 there is nothing but an upward spiral in terms of his
25 development and rehabilitation. And I think the Forward Focus

I43QBURs

1 group is the perfect proof of that. Of all the people in that
2 program, they chose two to be the valedictorian speakers, and
3 Nico Burrell was one of them. So there is great hope here of
4 redemption, and there is redemption. I believe in redemption.
5 I hope the Court believes in redemption. You're going to hear
6 from Mr. Burrell, and you will have a chance to judge the
7 sincerity of his remarks.

8 And I hope you will find it in your heart to do what
9 we think is the right thing and give him a sentence that gives
10 him a chance to be who he is now and who can even be better. I
11 went over his letter with him yesterday. He changed it a
12 little bit the remarks he wants to make. He wants to be better
13 than he is now, and now he's better than he was then, much
14 better.

15 And to the extent that the government says or implies
16 that this rehabilitation is a fraud, they're just wrong. And I
17 don't think that it's remotely accurate to suggest that he was
18 controlling in the sense of leadership 60 or 70 gang members.
19 That's not what happened here. I don't think it was that
20 sophisticated of an organization, that structured of an
21 organization.

22 It was a neighborhood that was in pain that is still
23 in pain, like so many neighborhoods in this City, like so many
24 gangs in this City. He was part of it, he's sorry for it, and
25 he's not going to be part of it again. But to give him a 20

I43QBURs

1 year sentence with time off for the time that he already did,
2 it's just inappropriate. It is just wrong. It is not what he
3 deserves. It is not who he was. It is not who he is.

4 Thank you.

5 THE COURT: Thank you, Mr. Goltzer.

6 Mr. Scotten, a couple of questions, and then I will
7 give defense counsel any last responses, and then an
8 opportunity for Mr. Burrell to make a statement.

9 One point that both defense counsel made was that for
10 a situation portion of the conspiracy, Mr. Burrell is
11 incarcerated. I think that ties to a broader question, which
12 is that I would like you to point me to the facts. I mean, you
13 talk about Mr. Burrell as a leader, and you do describe him as,
14 I don't know if you would have said the apex, but your
15 sentencing submission -- I don't want to misquote you --
16 started by saying, "Burrell is the most culpable defendant to
17 come before the Court thus far in this case."

18 MR. SCOTTEN: That's correct, your Honor.

19 THE COURT: I guess I would like you to help me
20 understand the government's position, put some flesh on the
21 bones of what it means to have been the leader that he is
22 stipulated to be. How do you understand his -- what's the
23 basis for saying he's the most culpable, and what are the facts
24 in the record that help put some flesh on the bones of his
25 leadership role?

I43QBURs

1 MR. SCOTTEN: Sure, your Honor.

2 So I think the best way for me to start with that is
3 to just read from the PSR because, again, it's not a government
4 assertion. I'm sure Mr. Goltzer didn't mean to contradict the
5 PSR, and he just agreed it was accurate.

6 So I'm in paragraph 25, your Honor, which is on page
7 19. "After Burrell's release from state prison," skip the
8 date, "Burrell acted as the head of BMB and made decisions for
9 the gang, including giving leadership positions to gang
10 members." So we don't think there's a dispute that he's at the
11 apex.

12 Now, I will agree with Mr. Goltzer, this is not a
13 hierarchal organization like an organized crime family where
14 some other gang member wants to do X, he has to send it up the
15 chain, get Mr. Burrell's approval, and it comes back down. I
16 agree that he did not have that type of control of the gang,
17 and, frankly, that is the reason, your Honor, that he is not
18 legally accountable for other murders and so on committed by
19 the gang as a street boss of a Lucchese family, for example,
20 might be.

21 What he did have was a position of authority such that
22 all other members of the gang recognized him as the most
23 senior, the person most respected. He was able to appoint
24 other people to leadership roles. Does that lead to a trail of
25 violence? Absolutely. Dominick Sherland, who murdered that

I43QBURs

1 15-year-old boy the Court heard about in the defense's
2 submission, was that person appointed to a leadership position
3 in the gang by Nico Burrell? Yes, he was. Mr. Burrell
4 recruited other members. That doesn't create violence in the
5 same way that a direct order does, but it absolutely creates
6 violence.

7 I'm overly formalizing, but essentially did he create
8 policy? He never would have called it that. Certainly, the
9 people who followed him wouldn't have. Yes. Was he the one
10 who enforced or created norms such as no snitching, fight the
11 other gang? Absolutely.

12 THE COURT: What paragraph do you point to for that
13 proposition?

14 MR. SCOTTEN: So, paragraph 25 only says "made
15 decisions for the gang." It does not specify which ones, but
16 the preemptory paragraphs, the Court is very familiar with
17 because they're in every PSR, describe what the major policies
18 of the gang were. They also mention Mr. Burrell extensively.
19 I think he's one of the few defendants to come before the
20 Court. He was also mentioned in the preamble because he was
21 that significant of a figure, so he's mentioned as a big suit
22 who could create other big suits. He's mentioned as enforcing
23 the Day One concept, that is the original core that can really
24 be trusted, that won't snitch when the time comes that law
25 enforcement comes. That's paragraph 17.

I43QBURs

1 So I do think it is very much -- your Honor, you have
2 a PSR that tells you what the gang did, what the defendant
3 specifically did in many cases, and that he was the head that
4 made decisions. I do think that's all in the record.

5 And I think the Court's question fairly gives me an
6 opportunity to address this video issue. I don't want the
7 Court to come away with thinking that videos are evidence of
8 leadership. They are some evidence of leadership. Even
9 Mr. Goltzer in his submission couldn't help but suggest that
10 videos are part of what pulls people into these gangs.

11 And it's true, if we needed to have a hearing and call
12 witnesses who could explain the powerful allure that you-too
13 presence creates that directly brings people into the gangs and
14 directly encourages rivalries, we can do that. But I think
15 their better evidence of gang of what Mr. Burrell says. We're
16 not having a Fatico, your Honor, so we're not going to put on
17 cooperating witnesses to talk about what Burrell said. But you
18 don't have to because you have these videos.

19 The one we sent you we chose because it was not a
20 slickly produced video glorifying a fake robbery, which is a
21 different video. It's just Burrell and other members of the
22 gang and he's saying things that he would say elsewhere, that
23 the PSR tells us he did: If we see an op, we shoot them. If
24 we see a member of the opposing gang, we shoot them. We don't
25 snitch. We don't even need a reason to shoot other people. My

I43QBURs

1 gang, my blandirs, we're killers. We're shooters. We brag
2 about bullets ripping through your tissue. I'm not saying that
3 as someone who doesn't know. I'm not Jay-Z. I'm someone who
4 sent some bullets through people's tissue a few years ago.

5 I suppose I should also note on that, your Honor, the
6 fact Mr. Burrell was in the prison for sort of the middle of
7 the conspiracy doesn't really take him out of influence. The
8 conspiracy is actually charged starting in 2007 when
9 Mr. Burrell was a very young man, but he was also founding the
10 gang then. It's charged for a significant period of violence
11 from 2014 to 2016 when he comes out. I don't see any evidence
12 of remorse. I don't see Mr. Burrell coming forward to describe
13 who killed Jordan Jaquette (ph), still an unsolved murder
14 committed by the gang.

15 I have couple other points, but I know the Court had
16 questions. I don't want to go into a free form rebuttal.

17 THE COURT: You did address it a little bit. I did
18 want to ask the government, Ms. Vargas both in the submission
19 and today pointed to individuals she thinks I should look to as
20 comparables, and I always ask the government for that here.

21 MR. SCOTTEN: I don't really think you have that, your
22 Honor. And the reason is, the Court has sentenced some
23 leaders, but it didn't have a lot of violence, and it sentenced
24 some very violent people but who were not leaders. The closest
25 is McClarty. He hasn't been sentenced yet. If we had to

I43QBURs

1 choose the second most leadership possessing person, that would
2 be McClarty. Other than that, I'm not sure your Honor
3 sentenced Anthony King.

4 THE COURT: I mean, Rasheid Butler, who was a leader
5 of the Triple M subset, he had his underlying acts to which he
6 pled for the RICO conspiracy included attempted murder of a
7 rival gang member.

8 MR. SCOTTEN: We do think it's very important that
9 he's a subset leader. I think the Court gave him a fairly
10 significant sentence.

11 THE COURT: I sentenced him to 151 months.

12 MR. SCOTTEN: Right. He was in fact a leader of a
13 subset of the gang, which makes him, I think, markedly less
14 culpable than Mr. Burrell. Certainly very culpable, we're not
15 arguing with the Court's sentence there. I'm sure we asked for
16 more than that. But there's a difference between leading the
17 entire gang and really being a sort of policy-setting figure as
18 Mr. Burrell, someone who could appoint other leaders and make
19 decision and being the violent leader of a subset of the gang.

20 THE COURT: I suppose that's true on a theoretical
21 level, but I think it depends on how sort of loose and
22 unstructured the structure of the gang was.

23 MR. SCOTTEN: Again, your Honor is right -- well, you
24 know, if we were dealing with an organized crime family, and
25 Mr. Butler was a captain and Mr. Burrell was the head, it would

I43QBURs

1 be easier to parse that out. I guess the point here is that
2 Burrell's actions served to influence throughout the entire
3 gang. To the extent you are considering leadership in terms of
4 things like making decisions to do terrible destructive
5 antisocial things, Mr. Burrell's leadership authority is having
6 wider impact than Mr. Butler. To the extent you're considering
7 the founding of the gang and the appointment of other leaders,
8 Burrell can have a much wider influence. He's still at the
9 top, even if he is not the top in an org chart kind of way, his
10 influence is still significantly greater than Butler's.

11 THE COURT: All right.

12 MR. SCOTTEN: The other couple points I want to make
13 very quickly, your Honor, I am not going to belabor the point
14 about the facts because I think the Court has it. There are a
15 lot of facts that show no rehabilitation, continuous return to
16 violence. I'm not mocking or denigrating any of the facts that
17 show talent, ability, motivation. I just think that's all the
18 Court has actually seen. And I think that was always there
19 from the beginning.

20 I don't think there's any evidence, not an ounce of
21 Mr. Burrell getting out of jail and abandoning the gang life.
22 Yes, he helps his family, his friends. He's inspirational., he
23 would hardly be the first criminal leader to come before this
24 Court who took care of his family, who looked out for his
25 friends, who inspired people. That's part of what a good

I43QBURs

1 leader is. People follow good leaders. I'm not denying
2 Mr. Burrell is a good leader. But so far he has shown
3 repeatedly he will put that to terribly destructive ends, and I
4 do think the Court should consider that.

5 The last two points, your Honor, I want to make sure
6 the record is clear on this assault that occurred. It keeps
7 getting referred to as a fight. It's not a fight. I think we
8 gave the Court the testimony. The testimony describes the
9 video. We decided not to put a video in evidence and also not
10 to argue about that. But in short what happens is the victim
11 is seen at a phone bank. The other member of the assault, the
12 second person, passes by Burrell, signals to him "Come on.
13 Let's go get this guy." And then two men attack one man. They
14 begin beating him. The guards intervene. And, yes, Burrell
15 freezes.

16 After -- you can see this on the video and it's
17 described in testimony we gave the Court. After, he very
18 carefully turns to another inmate and throws him an object.
19 Reasonable decision? Yes. Evidence of rehabilitation? No.

20 And then finally, your Honor, this is not 3553(a)
21 factor, but I want to make it absolutely clear. The
22 government's current understanding of the parties' position is
23 that both parties are allowed to make the arguments they made
24 today and that neither party believes the other would be in
25 breach. I want to be very clear about that and give the

I43QBURs

1 defendants any opportunity they want to try to get
2 Mr. Burrell's plea back because now is the time to do it; not
3 after a sentence is imposed.

4 MR. GOLTZER: May I have two minutes?

5 THE COURT: You may.

6 MR. GOLTZER: Thank you.

7 I would like to pose a rhetorical question to the
8 Court. If the government is right that Mr. Burrell was the
9 leader of the pack, how could it be that from 2009 to 2014 this
10 loose enterprise was able to function in his absence? How
11 could it be that people were getting shot; that crack, which he
12 never pled to was being sold; that people were being recruited;
13 that policies were being made? How could it be that any of
14 that could have happened without the kingpin?

15 It's obvious that this gang or this loosely
16 put-together enterprise was fully capable and did function
17 without Mr. Burrell for years and then to the extent that the
18 government needs Carlo Gambino, they've chosen Mr. Burrell and
19 this other fellow. But it's a fable. There's no evidence of
20 it. They have a snitch.

21 MR. SCOTTEN: I think we may need a hearing.

22 MR. GOLTZER: We don't need a hearing. The government
23 has had every opportunity to put in whatever it wanted to put
24 in, and what's in the presentence report, the PSR in terms of
25 the narrative, is the government's version of events. We're

I43QBURs

1 not arguing that he wasn't a leader. We've addressed that, but
2 they've overstated it.

3 THE COURT: Unless you are asking for a hearing, it's
4 no longer just the government's version of events. It's the
5 factual record which I've adopted for purposes of the
6 sentencing proceeding.

7 MR. GOLTZER: And I mentioned to the Court, and I say
8 this most respectfully, there is leadership and then there's
9 leadership, which you've sentenced several leaders. There are
10 other leaders in the case.

11 THE COURT: I get that, but in terms of the facts I
12 rely on to make an assessment of what his role as a leader is,
13 you're not asking for a factual hearing.

14 MR. GOLTZER: No. But I'm saying, and I think it's
15 accurate, that they have overstated it. The government just
16 said it's a loose -- it's loose. Did I hear that correctly? I
17 think I heard that correctly.

18 THE COURT: Yeah.

19 MR. GOLTZER: That it is not as hierarchal as the
20 Lucchese crime family. It's just not the same. To the extent
21 that they allege these gangs are enterprises, that's fine, we
22 understand that. To some extent, they're loose.

23 THE COURT: Again, not just alleged; pled to here.

24 MR. GOLTZER: I understand that.

25 THE COURT: I want the record to be clear.

I43QBURs

1 MR. GOLTZER: I'm not backing off, but as I mentioned
2 earlier, when we were addressing questions about the report,
3 there are degrees and there are nuances and it's being terribly
4 overstated and what's being terribly understated by the
5 government is his rehabilitation and the fact that he's
6 changed. That's all I'm saying. And that's all I want the
7 Court to know, and I hope you accept that.

8 THE COURT: I do. Mr. Goltzer, I do want to be clear,
9 I think we have a clear answer to this, but if there is any
10 contention that the government has breached the plea agreement,
11 now is the time to make that contention and make any request
12 with respect to that.

13 MR. GOLTZER: No, there is not. We think that their
14 argument is misguided, but that's a different issue. But as
15 far as a legal conclusion of breach, we're not going there.

16 THE COURT: All right. Thank you.

17 MR. GOLTZER: Thank you.

18 THE COURT: With that, Mr. Burrell, I have read your
19 letter, sir, but I want to give you an opportunity to make a
20 statement here in court. You don't have to, but if you'd like
21 to, you may do so now.

22 THE DEFENDANT: Good morning, Judge Nathan.

23 First I want to tell you the steps I did when I
24 started making music. I started writing music in 2013 in Bain
25 Correctional Facility. When I came home to find my music in

I43QBURs

1 2014, I took that music to my manager. My manager been
2 managing people that does music. He took the music and brought
3 it to a producer. That producer looked me in my face and told
4 me, "If you rap like this, I could give you a million dollars
5 like Jay-Z. I could get you a million dollars like Rick Ross.
6 I could give you a million dollars like Meek Mill. I know my
7 lyrics is not good. My lyrics is not positive. But that was
8 the material that was being made at the time. That's the
9 material that I looked at the You Tube, and they gained a
10 million views.

11 Now I got a chance. I got a million views on You
12 Tube. I got the record labels asking to ask when I'm coming
13 home, and when I'm coming home, I would like to sign him. This
14 is my chance off of that music. So I know that you don't
15 understand. The ADA don't understand why the music is violent
16 or why I choose to rap that way, but that's why I did it.
17 Jay-Z got locked up for aggravated assault and drugs, but he
18 still rapped and overcame that, and that's what I want to do.

19 But I want wrote something I want to read to you
20 that's in front of me.

21 THE COURT: Go ahead.

22 THE DEFENDANT: When my mom got deported, it hit me
23 like a ton of bricks.

24 I was a 15-year-old boy who thought I was a man, but
25 made poor decisions and made excuses for my actions. And even

I43QBURs

1 though I was supposed to be there for my family at the time
2 they needed me the most, I let them down by going to jail.

3 Well, I'm no longer that person. And I haven't been
4 since I was 18-years-old. My name been dragged through mud
5 from the news and ADA at bail and sentencings and hearings
6 making me a character out of the latest gangland book even
7 though I only been locked up one time in my entire life, and
8 even though I only been home 20 months in the last nine years,
9 or even that I maintained -- and maintained a crack spot when I
10 was living in a shelter and sleeping on my sister's couch,

11 Judge Nathan, I came back from my six-year bid and
12 took my pain and frustration and put it into my music to make
13 something out of myself. To erase the feeling of feeling like
14 a disappointment. To erase the feeling that I gave up on my
15 family and disappointed my family.

16 It excites me when I hear my manager tell me that a
17 major record label wants to sign me or when I hear my music on
18 the radio. It makes me feel proud of myself. That I could
19 finally use my music to get my family out of cursed situations,
20 like my grandmother not being able to afford medicine or my
21 aunt getting laid off from her job because she can't pay the
22 rent.

23 But I'm locked up again, Judge Nathan. I hear y'all
24 ask what's the difference between now and five years ago --
25 five and a half years ago. The difference is my grandmother is

I43QBURs

1 about to leave me, Judge Nathan, and I can't help her right
2 now. I can't even give her a kidney right now if I wanted to.
3 I can't. Judge Nathan, give me a chance, man. Give me a
4 chance to prove them wrong. Give me a chance to prove
5 everybody wrong. Give me a chance to be a brother to my
6 sisters, a cousin to my cousins, an aunt to my nephew -- a
7 nephew to my aunt, a grandson to my grandmother, a son to my
8 mother, an uncle to my nieces, and most important, my nephews
9 so they don't have to know what an MCC cell looks like. They
10 don't have to go running to the street for guidance and love
11 like I did growing up at 16-years-old, Judge Nathan. Give me a
12 chance to take my family out of poverty and break the cycle
13 that been bringing us down these last 12 years.

14 I made some mistakes, and, Judge, that's in my past.
15 And I want to say I'm sorry for what I did to my family, to the
16 community, to the Court. I grown out of it. I grown out of
17 that crazy part of my life. I'm now who I am, and I hope to be
18 better than I am. Judge Nathan, I'm just asking for a chance.
19 Thank you very much.

20 THE COURT: Thank you, Mr. Burrell.

21 Counsel, anything further? Any reason why sentence
22 cannot be imposed at this time?

23 MR. SCOTTEN: No, your Honor.

24 MR. GOLTZER: No, your Honor.

25 MS. VARGAS: No, your Honor.

I43QBURs

1 THE COURT: As I've stated, the guideline range
2 applicable to this case is 135 to 168 months' imprisonment.
3 Under the Supreme Court's decision in *Booker* and its progeny,
4 the guideline range is only one factor that the Court must
5 consider in deciding the appropriate sentence.

6 I'm also required to consider the other factors set
7 forth in 18 U.S.C. Section 3553(a). These include the nature
8 and circumstances of the offense, and the history and
9 characteristics of the defendant, the need for the sentence
10 imposed to reflect the seriousness of the offense, to promote
11 respect for the law, and to provide just punishment for the
12 offense, to afford adequate deterrence to criminal conduct, to
13 protect the public from further crimes of the defendant and to
14 provide the defendant with needed vocational or educational
15 training, medical care or other treatment.

16 I am to take into account the kinds of sentences
17 available, as I said, the guideline range, any pertinent policy
18 statement, and the need to avoid unwarranted sentence
19 disparities among defendants with similar records who have been
20 found guilty of similar conduct.

21 I am required to impose a sentence sufficient but no
22 greater than necessary to comply with the purposes I've just
23 described.

24 I have given substantial thought and attention to the
25 appropriate sentence in this case in light of the 3553(a)

I43QBURs

1 factors and the appropriate purposes of sentencing as reflected
2 in that statute.

3 Mr. Burrell stands convicted of an extremely serious
4 offense. He pled guilty to participating in the racketeering
5 conspiracy. He was the leading member of the violent street
6 gang BMB that operated in the Bronx. BMB trafficked in
7 narcotics including oxycodone, crack cocaine, marijuana and
8 other prescription pills. Members of the gang and associates
9 kept firearms and engaged in acts of violence, including
10 shootings, stabbings and assaults. BMB has a violent cultural
11 norm against snitching or cooperating. This gang ravaged the
12 areas it occupied with its dangerous drugs and violence. It
13 did real damage to the neighborhood.

14 As noted, Mr. Burrell was the leading member of this
15 gang. His first major act took place in 2009 when he shot a
16 rival gang member. And in the course of that shooting, an
17 innocent bystander was also shot. He faced punishment. He
18 interacted with the criminal justice system and faced
19 punishment for that. He was sentenced to five and a half years
20 of prison.

21 Upon his release, he did resume his BMB activities, as
22 it states in paragraph 25 of the PSR. After his release from
23 prison in 2014, Mr. Burrell acted as the head of BMB and made
24 decisions for the gang, including giving leadership positions
25 to gang members. His activity individually included selling

I43QBURs

1 narcotics, carrying weapons. He led the gang and he extolled
2 the violence of the gang, and in the course of doing so
3 fostered the gang culture of enforcement against snitches and
4 rival gang violence.

5 I want to be clear, I am not sentencing Mr. Burrell
6 for his music and for his expression contained in that music.
7 I appreciate Mr. Burrell's talent, and I recognize that the
8 music he creates and makes has an expressive element, and he's
9 not being punished for that. But I do take into account in
10 conjunction with the stipulation to the leadership role that
11 there was a fostering and extolling of the violent gang culture
12 that is communicated by Mr. Burrell during the course of some
13 of that activity and other.

14 It's difficult to not take as a significant fact that
15 despite the punishment he received in 2009 and serving five and
16 a half years for that, that he returned to the gang and
17 continued in a leadership role which does suggest the need for
18 a very substantial punishment.

19 Also very concerning is that even upon incarceration
20 here for this instant offense, the violent activity did
21 continue, and he committed an aggravated assault in prison
22 against someone who is a witness involved in a separate federal
23 prosecution, seemingly acting out on the gang culture of
24 engaging in acts of violence against cooperators, which is very
25 troubling.

I43QBURs

1 I indicated that I was including that in my guidelines
2 calculation. I said it before and I'll say it again, I want to
3 make clear even if I hadn't, I would take it into account as
4 part of the 3553(a) factors.

5 Mr. Burrell, it's interesting -- as you just said,
6 Mr. Burrell, you don't have an extensive criminal history, you
7 were incarcerated for your other known conviction at the age of
8 16, and you served five and a half years. You didn't have a
9 lot of time between your release there and incarceration here,
10 so it's hard to know what to make of that record, except two
11 things: It's not an extensive criminal history, to be sure,
12 but the criminal history that exists is both extremely serious
13 and didn't serve as a sufficient deterrence to your leadership
14 involvement in the gang activity here.

15 Given Mr. Burrell's leadership of this destructive
16 gang, the level of violence that Mr. Burrell has himself
17 participated in, the extolling of the violence of the gang and
18 the continuation of violent activity after prior incarceration
19 and even after incarceration here, I have no doubt that a very
20 serious sentence is warranted to protect the public, to impose
21 just punishment, to promote respect for the law and to deter
22 Mr. Burrell and others.

23 Of course I must, and I do, take into account the
24 history and characteristics of this defendant. Mr. Burrell
25 pled guilty and has accepted responsibility for his conduct.

I43QBURs

1 He's obviously faced substantial obstacles and difficulties
2 during the course of his young life, better discussed at length
3 in the mitigation report and the defense submission and as
4 discussed here today, obvious tremendous instability and
5 separation from loved ones following the deportation of his
6 parents and the difficult life circumstances of homelessness
7 and the like.

8 He has made admirable efforts at rehabilitation during
9 incarceration here. At least there's indications of that:
10 Involvement in a variety of programs, including Focus Forward
11 and obviously seen by the facilitators of that program who've
12 written me and who are here today as someone with leadership
13 ability and potential. He's obviously a very bright young man
14 with leadership ability. He's well read. You've read more
15 than me in the last couple of years, Mr. Burrell, and I'm glad
16 to see it. You're a bright man, and that intelligence is
17 reflected both in your writing, in your speaking, obviously in
18 your speaking ability that was identified by the Focus Forward
19 program, and in the writing that constitutes your music.

20 The question going forward, the fundamental question
21 here is whether Mr. Burrell will use those leadership
22 abilities, those skills, his intelligence as he has in the past
23 toward criminal conduct and criminal organization or toward
24 creating a better life for himself and his community. It's a
25 mixed record. Obviously, there are indications from the

I43QBURs

1 letters I've received and the steps taken in incarceration that
2 those skills can be put to good use, but for the reasons I
3 indicated earlier, there are troubling facts which suggest that
4 if that real change has come, it has come only very recently
5 and not after prior incarceration and not even after
6 incarceration here. But I do take those facts into account.

7 I will sentence Mr. Burrell to avoid unwarranted
8 sentence disparities. I think it's right to say that he is
9 different than many of the defendants I have sentenced.
10 There's violence here, which is of great concern to me,
11 although it was when he was only 16, but I'm obviously
12 concerned about whether it's the apex or not, the high level of
13 leadership in the gang that's been stipulated to, and I think
14 it does at least make him comparable with someone like Rasheid
15 Butler who I sentenced and others who helped facilitate the
16 gang in important ways who provided leadership, who set
17 policies, who extolled violence and enforced that cultural
18 norm.

19 I reject the government's request to sentence with an
20 upward variance. I don't believe that the record here
21 significantly establishes a level of culpability that well
22 beyond others who I've sentenced, and I think there is more of
23 a glimmer of hope that the rehabilitation that's been presented
24 can be real and actualized in the future.

25 I also reject the defense's request for a downward

I43QBURs

1 variance. I actually think here that the guideline range
2 appropriately captures the level of culpability as well as the
3 history and characteristics of the defendant that come together
4 with a complicated and quite mixed picture with uncertainty as
5 to the future but the possibility, as Mr. Goltzer said, of
6 redemption.

7 But the punishment must be sufficient in light of the
8 level of violence, the leadership role, the destructive nature
9 of this gang, the extolling of violence and the continuation of
10 violence that has occurred despite incarceration and prior
11 punishment. In sum, I have concluded that a guideline sentence
12 is appropriate for the reasons that I've indicated. I will
13 upon stating my sentence subtract the approximately 66 months
14 for time served pursuant to 5K2.23.

15 Mr. Burrell, I will ask you to please rise as I state
16 your formal sentence. It is the judgment of this Court that
17 you be sentenced to a period of 150 months, that's one five
18 zero, to be followed by a period of three years of supervised
19 release, and I will, as I said, subtract 66 months for time
20 served pursuant to 5K2.23, which produces a sentence of
21 approximately 84 months, to be followed by a period of three
22 years of supervised release.

23 You may be seated, sir.

24 During your term of supervised release, the standard
25 conditions of supervision shall apply.

I43QBURs

1 In addition, you will be subject to the following
2 mandatory conditions: You shall not commit another federal,
3 state or local crime.

4 You shall not unlawfully possess a controlled
5 substance.

6 You must refrain from any unlawful use of controlled
7 substance and submit to one drug test within 15 days of release
8 from imprisonment and to periodic drug tests as determined by
9 the court and probation.

10 As I said, you must comply with the standard
11 conditions of supervision which are outlined on pages 39
12 through 40 of the PSR.

13 In addition, you will be subject to the following
14 special conditions:

15 You will be subject to the search term that's outlined
16 on page 40 of the PSR. Specifically, you must submit your
17 person, residence, place of business, vehicle, and any property
18 or electronic devices under your control to a search on the
19 basis that the probation officer has reasonable suspicion that
20 contraband or evidence of violation of the conditions of your
21 supervised release may be found.

22 Also, as indicated in the PSR, I'm imposing a special
23 condition that you enter and complete an education and/or
24 vocational training program, which includes preparation for the
25 GED and as directed by the court and probation, and I will pay

I43QBURs

1 attention during your period of supervision to both education
2 and employment.

3 I do recommend that you be supervised this your
4 district of residence.

5 I will waive the fine because I don't believe that you
6 have the ability to pay the fine.

7 I am imposing a mandatory special assessment of \$100
8 which shall be due immediately.

9 Does either counsel know of any legal reason why the
10 sentence should not be imposed as stated?

11 MR. SCOTTEN: No, your Honor.

12 MR. GOLTZER: No, Judge.

13 THE COURT: The sentence as stated is imposed.

14 I do find that the sentence is sufficient but not
15 greater than necessary to satisfy the sentencing purposes that
16 I described earlier.

17 As I indicated, and I will just state formally, that
18 even had I not imposed the upward departure pursuant to 5K2 --
19 who can remind me?

20 MR. SCOTTEN: I think it is 5K2.0 --

21 THE COURT: 5k2.0(a)(2)(A).

22 MR. SCOTTEN: Yes, your Honor.

23 THE COURT: Even if I had not imposed the upward
24 departure pursuant to that, I would have arrived at the same
25 sentence pursuant to the 3553(a) factors.

I43QBURs

1 Mr. Burrell, when you are released and on supervised
2 release, you will have the guidance and support of the
3 probation department. As you reestablish your day-to-day life
4 during your period of supervised release, please take advantage
5 of these resources as the people in probation are committed to
6 helping you succeed.

7 That said, I must caution you that you must comply
8 strictly with all of your conditions of supervised release. If
9 you are brought back before me for a violation of those
10 conditions, I may sentence you to another term of imprisonment,
11 and I hope and expect you won't put me to that decision.

12 Counsel, are there any requests regarding designation
13 and the like?

14 MR. GOLTZER: Yes, your Honor. We would request that
15 you recommend to the Bureau of Prisons a designation to a
16 facility as close as possible to the Metropolitan New York area
17 to facilitate further contact with family and friends.

18 THE COURT: I do make that recommendation for
19 placement in a facility as close to New York City area as
20 possible to help facilitate maintenance of ties with
21 Mr. Burrell's family.

22 Mr. Scotten, are there any remaining counts or
23 underlying indictments that need to be dismissed at this time?

24 MR. SCOTTEN: There are, your Honor, and the
25 government moves to dismiss them.

I43QBURs

1 THE COURT: They are dismissed.

2 Mr. Burrell, I'm required to inform you of your
3 appellate rights. To the extent you have not given up your
4 right to appeal your conviction and your sentence through your
5 plea of guilty and the agreement that you entered into with the
6 government in connection with that plea, you have the right to
7 appeal.

8 If you are unable to pay the cost of an appeal, you
9 may apply for leave to appeal in forma pauperis, meaning you
10 don't have to pay any filing fee. The notice of appeal must be
11 filed within 14 days of the judgment of conviction.

12 Counsel, is there anything else that I can address at
13 this time?

14 MR. SCOTTEN: No. Thank you, your Honor.

15 MR. GOLTZER: No. Thank you, Judge.

16 MS. VARGAS: No, your Honor.

17 THE COURT: My thanks to counsel for their advocacy.

18 Good luck to you, Mr. Burrell.

19 We're adjourned.

20 (Adjourned)